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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

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No.

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NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC. and UNITED MOTOR FREIGHT, INC., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, ET AL., *Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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*To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

National Motor Freight Traffic Association and United Motor Freight, Inc. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this cause on December 6, 1966.

## OPINIONS BELOW

The Court of Appeals wrote no opinion. It's judgment appears in Appendix hereto, p. 14a. The Opinion and Order of the Civil Aeronautics Board affirmed by the Court of Appeals appear in Appendix hereto, p. 17a.

## JURISDICTION

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code. The judgment of the Court of Appeals was entered on December 6, 1966. No petition for rehearing was filed.

## QUESTIONS PRESENTED

1. Has the Civil Aeronautics Board employed lawful criteria to determine whether or not motor common carriage of property can be authorized and regulated by it as pickup and delivery service in connection with air transportation within the meaning of Section 403(a) of the Federal Aviation Act and Part 222 of its Economic Regulations?

2. May the Civil Aeronautics Board grant an application by an air carrier for authority to perform the motor common carriage of property upon a finding that such transportation is truly pickup and delivery service in connection with air transportation when the finding is based solely on allegations of fact in the application and is made in the face of objections and a request for hearing by competing common carriers, which objections and request join issues of fact?

3. Are the findings of the Civil Aeronautics Board that the motor common carriage it authorized is truly pickup and delivery service in connection with air transportation supported by substantial evidence?

## STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Interstate Commerce Act, the Federal Aviation Act, the Administrative Procedure Act, and of the regulations of the Interstate Commerce Commission and the Civil Aeronautics Board are set forth in Appendix hereto, p. 1a *et seq.*

## STATEMENT OF THE CASE

Petitioner National Motor Freight Traffic Association (NMFTA) is a non-profit membership corporation whose members are some 4,000 common carriers of property by motor operating in interstate and foreign commerce under certificates of public convenience and necessity issued by the Interstate Commerce Commission. Pursuant to Section 5a of the Interstate Commerce Act, 49 U.S.C. Section 5b, NMFTA is the agency by which its members collectively discharge their duty under Section 216 of that Act, 49 U.S.C. § 316, to establish and maintain lawful classifications of property and lawful rules, regulations and practices governing the transportation they perform. As this Court held in *National Motor Freight Traffic Association* v. *United States,* 372 U.S. 246, 247 (1963), NMFTA performs "significant functions in the administration of the Interstate Commerce Act" and has standing to represent its members in judicial proceedings in which the validity of the actions of administrative agencies is at issue.

Petitioner United Motor Freight, Inc., a member of NMFTA, is a motor common carrier performing the transportation of property in interstate and foreign commerce under a certificate of public convenience and necessity issued by the Interstate Commerce Commission. As here pertinent, United's certificate authorizes

carriage between Flint, Michigan and Willow Run and Metropolitan Airports, which serve Detroit, Michigan, but restricts United to the carriage of property having an immediately prior or an immediately subsequent movement by air.

On June 15, 1964 Emery Air Freight Corporation, an indirect air carrier, i.e., an air freight forwarder, filed an application under Section 222.3(a) of the Economic Regulations of the Civil Aeronautics Board, 14 C.F.R. 222.3(a), Appendix, p. 11a, for authority to perform the motor common carriage of property between the Detroit Airports and Flint.[1] The application recited that, although Flint is served through its own airport by air carriers certificated by the Board to so serve it, their service is limited; that most of the flights to and from Flint are via Detroit; that Detroit is as convenient to reach from Flint "by surface transportation as it is by air"; that because all flights to and from Flint's airport via Detroit use Willow Run Airport, while most flights between Detroit and other cities use Metropolitan Airport, most freight flown into or out of Flint must be shuttled between Willow Run and Metropolitan Airports; that the use of air transportation between Detroit and Flint is therefore discouraged, as illustrated by instructions to Emery from "one of the largest firms in Flint" to terminate its incoming air traffic at Detroit and forward it by motor

[1] Procedurally the application sought authority to file a tariff naming Flint as a point in Emery's Detroit pickup and delivery zone. However, since Section 403(a) of the Federal Aviation Act, 49 U.S.C. § 1373a, Appendix, p. 1a, forbids the performance of any transportation not provided for in tariffs, the effect of granting the application was to authorize Emery to perform transportation that it could not otherwise lawfully perform without authority from the Interstate Commerce Commission.

carrier to Flint; that Emery had removed Flint from its tariffs as a point served by it and was terminating all of its traffic to Flint at Detroit for motor carriage beyond; that Emery desired to add Flint to its Detroit pickup and delivery area "to co-ordinate and control the Detroit-Flint surface movement"; and that this "would be a bona fide pickup and delivery operation in all respects and would serve to develop, as no other method could, Flint's full cargo potential." (Record, pp. 1-2).

On July 6, 1964 NMFTA moved the Board to dismiss Emery's application for failure to supply the economic data and other facts required by Section 222.3(a) of the Board's Regulations, or, alternatively, to set the application for hearing (Record, p. 5 *et seq.*). On September 28, 1964, in response to the Board's *ex parte* request, Emery filed an amendment to its application in which it said that it intended to render service only within the corporate limits of Flint, and to use straight trucks with a capacity of 5,000 pounds; that the service would be a "special service for Flint" since it does not provide service at nearby locations; and that its rate would be $1.75 per hundred pounds, subject to a minimum of $3.50 (Record, p. 13).

On March 25, 1965 NMFTA renewed its motion to dismiss Emery's application (Record, p. 17) on the grounds, *inter alia,* that the proposed motor common carriage was not "incidental to transportation by aircraft" within the meaning of Section 203(b)(7a) of the Interstate Commerce Act, 49 U.S.C. § 303(b)(7a), Appendix, p. 1a, and thus not a service "in connection with" air transportation within the meaning of Section 403(a) of the Federal Aviation Act, 49 U.S.C.

§ 1373(a), Appendix, p. 1a; that the carriage was therefore beyond the jurisdiction of the Board to authorize Emery to perform; and that the amended application violated Section 222.3(a) of the Board's Regulations in that it set forth no economic data or other facts to establish that the proposed carriage would be truly pickup and delivery service. NMFTA also renewed its alternative request for a hearing, which it supported with an affidavit by the Treasurer of United (Record, pp. 32-36), which was quoted in part in Circuit Judge Fahy's dissenting opinion as follows (Appendix, p. 15a):

> "Since the operating authority of United Motor Freight is limited to the handling of air freight its success depends on its ability to do what it has done, namely, gear its operations to the specific needs of shippers and receivers of air freight. This specialized service is nevertheless line haul service. The cities of Lansing, Jackson, Owosso and Flint could not be adequately, economically or efficiently served in pick up and delivery operations. One hallmark of pickup and delivery of less-than-truckload shipments is their movement from point of receipt by the carrier to point of delivery by that carrier without consolidation with other shipments, i.e., without 'terminalling.' The distance from Flint to the Detroit airports is too great to permit this to be done economically or efficiently as a matter of routine. Hence, apart from the fact that Flint is in no sense within the bounds of the commercial zone or terminal area of Detroit, air freight shipments to and from Flint are and must be handled as line haul movements."[2]

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[2] Emery's application claimed that Flint is "approximately 45 miles" from Detroit. But the affidavit of United's Treasurer gives the distance between Flint and the Detroit airports as 65 or 80 miles, depending on the route used (Record, p. 33). See dissenting opinion of Judge Fahy (Appendix, p. 14a).

On December 6, 1965 the Board, reciting that it had "carefully reviewed the Emery application and the objections thereto" and considered "all relevant facts", issued an order granting Emery's application (Appendix, p. 17a). Thereupon, Petitioners, pursuant to Section 1006 of the Federal Aviation Act, 49 U.S.C. § 1486, filed their petition to review the Board's order in the United States Court of Appeals for the District of Columbia Circuit. On December 5, 1966 the Court, per curiam and without opinion, entered the following judgment (Appendix, p. 14a):

> "This case came on to be heard on the record from the Civil Aeronautics Board, and was argued by counsel.
>
> "ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the order of the Civil Aeronautics Board on review herein is affirmed. See Law Motor Freight v. CAB, Inc., (sic) No. 6731 1st Cir., July 20, 1966."

Judge Fahy dissented on the ground that Section 222.3(d) of the Board's Economic Regulations, 14 C.F.R. 222.3(d), Appendix, p. 12a, requires a finding that the service proposed is "a pickup and delivery service as distinct from a line haul service", and that a controversy over the nature of the service arose when Petitioners, supported by United's affidavit, challenged "the claim of Emery that the tariff was for a good faith pickup and delivery service and not a service which in fact could be furnished only by a line haul operation." (Appendix, p. 15a). Judge Fahy also pointed out that United had "brought to the Board's attention that the ICC, acting under comparable statutory provisions, had held that service between Detroit Airports and Flint was not 'incidental to transporta-

tion by aircraft' and therefore was not exempt from the Commission's certification requirements." (Appendix, p. 16a, footnote omitted).

## REASONS WHY THE WRIT SHOULD BE GRANTED

### The Question Is Important

This case and its companion here, *Law Motor Freight, Inc., et al.* v. *CAB,* October Term, 1966, No. 989, are of first impression in this Court and the Courts below, and are the first in which the Civil Aeronautics Board granted applications by air carriers to perform motor common carriage under Part 222 of its Economic Regulations. As the Board itself said in answer to an inquiry as to the status of the applications, "these are pilot cases [that] present new policy questions with no precedent for guidelines." (Record, p. 64). The Board's resolution of the "new policy questions" and the interpretation and application of the Federal Aviation Act and its regulations thereunder on which its resolution rests will have a far reaching impact upon the public, upon the relationship between air carriers and surface carriers, upon the division of regulatory authority between the Board and the Interstate Commerce Commission, and hence upon the future of the nation's transportation system.

The basic problem in both cases stems from the fact that the economic regulation of motor common carriage in interstate and foreign commerce was delegated by the Congress in part to the Interstate Commerce Commission and in part to the Board. Thus the Commission has economic regulatory authority over motor common carriage except that which is "incidental to transportation by aircraft." Interstate Commerce Act, Section 203(b)(7a), 49 U.S.C. § 303(b)(7a), Appendix, p. 1a. The Board has economic regulatory au-

thority over motor common carriage by air carriers that is rendered as part of their "services in connection with such air transportation" as it has authorized them to perform. Federal Aviation Act, Section 403(a), 49 U.S.C. § 1373(a), Appendix, p. 1a. Both the Commission and the Board have plenary authority within their respective jurisdictions, i.e., authority to control entry into the business of carriage and authority to prescribe the terms, conditions and rates which those licensed to enter the business must observe.

The seeds of inter-agency conflict contained in this division of authority between the Commission and the Board lay more or less dormant as long as the transportation of freight by air was of little practical significance, which was the case until recently. Thus, in 1956 the total freight traffic of all air carriers certificated by the Board was only .45 billion ton miles. But by the year 1961 it had risen to 1 billion ton miles, and for the 12 months ending June 30, 1966 it was 2.6 billion ton miles, which was an increase of 40 percent over the 12 months ending June 30, 1965. *CAB Chart Book of Airline Economic Trends,* Vol. 1, No. 1, Nov. 1966, Chart 14, pp. I-27, I-28. And the tons of domestic air freight emplaned at 20 major cities increased 63 percent from 1955 to 1960 and 90 percent from 1960 to 1965. With these increases has come a broadening of the consist of the traffic. Thus, in 1955 ten commodities accounted for 80 percent of the tonnage. In 1965 ten commodities accounted for slightly over 50 percent of the tonnage. Air Transport Association of America, *Air Transport Facts & Figures,* 1966, p. 13.

Moreover, the Board reads the declaration of policy in Section 102 of the Federal Aviation Act, 49 U.S.C. 1302, as requiring it to promote air transportation at

the expense of surface transportation. For example, in 1964 it approved so-called blocked space service by all-cargo air carriers because a "large volume of traffic now moved on surface carriers will become available if air carriers achieve a break-through in properly servicing such traffic" and it considered that "its statutory responsibility to promote air transportation required it to pursue earliest possible achievement of the breakthrough." *American Airlines, Inc.* v. *CAB,* 359 F. 2d 624, 626-627 (D.C. Cir. 1966); cert. den., 17 L. Ed. 2d 75 (1966).[8]

The most recent promotional effort of the Board was its sponsorship, jointly with the National Industrial Traffic League, a nationwide organization of shippers, of a series of so-called air cargo workshops, which were meetings among air carriers, shippers and personnel of the Board convened in 1966 in various strategically located cities throughout the country for the purpose of fostering the greater use of air carriers in the transporation of freight. As the Chairman of the Board said in his address to the fourth such workshop, held in Chicago, Illinois in October of 1966:

> "I think it would be appropriate to mention three words which recur rather persistently in the declaration of policy which begins the statute under which the Board operates. These three words are: promotion, encouragement, development. We take these words, and all that they ask for, very seriously."

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[8] Blocked space service is the carriage of property at wholesale rates applicable only when the user reserves and agrees to pay for a specified amount of space on a regularly recurring basis for a period of at least 60 days. *American Airlines, supra,* at p. 625, fn. 2.

We do not challenge the right of the Board to administer the Federal Aviation Act so as to promote air transportation. We do challenge the right of the Board to promote the welfare of air carriers by authorizing them to engage in motor transportation in competition with motor carriers regulated by the Interstate Commerce Commission in disregard of the limitations on the Board's powers contained in that Act. Part 222 of the Board's Economic Regulations and its orders under Section 222.3 thereof demonstrate that it is doing just this. Thus, in the Preamble to Part 222, Appendix, p. 6a, at p. 8a, after noting that the "full development of air cargo transportation depends, in large measure, upon efficient surface transportation", the Board goes on to say that effective surface transportation can best be guaranteed when the direct air carriers and the air freight forwarders control it, either by operating their own trucks or employing local cartagemen as their agents.

True enough, the Preamble to the Regulations recites that motor transportation by air carriers constitutes "services in connection with" air transportation within the meaning of Section 403(a) of the Federal Aviation Act only if it is "truly air cargo pickup and delivery . . . as distinguished from line-haul or over-the-road surface transport." Appendix, p. 9a. And Section 222.3(d) of the Regulations themselves provides that applications by air carriers for authority to perform motor carriage will not be approved unless the Board makes a "finding that the proposed tariff involves service in connection with air transportation." However, as we shall show, the overriding basis for such findings is the Board's policy to put the motor transportation of traffic moving partly by air and partly by motor in the hands of the air carriers.

Interestingly enough, the direct air carriers, the only carriers who actually operate aircraft and haul freight, do not seem to share the Board's view that control of the surface carriage that precedes and follows air carriage must be in their hands. All of the applications filed under Section 222.3 of the Board's regulations to date have been by indirect air carriers, i.e., air freight forwarders. Moreover, in the proceedings before the Interstate Commerce Commission in which its regulations discussed *infra* were promulgated, Air Cargo, Inc., the agent of most of the direct air carriers charged with arranging for motor service for them, supported the rationale of *Panther Cartage Co. Extension—Air Freight,* 88 M.C.C. 37 (1961), in which the Commission had held that motor carriage by or for air freight forwarders could be considered exempt from regulation by it only if confined to the terminal areas of the direct air carriers. See *Motor Transportation Of Property Incidental To Transportation By Aircraft,* 95 M.C.C. 71, 78, 82 (1964).

To date the Board has granted six applications filed by air freight forwarders under Section 222.3 of its Regulations. Two of its orders are before this Court. The four others are before the United States Court of Appeals for the District of Columbia Circuit, being held in abeyance to abide the decision of this Court in this case. In all six the Board grounded its orders on the rationale of this case, namely: (1) that the cities to which the air forwarders proposed to render motor service either have no air service, as in *Law* (Pet. for Cert. in No. 989, Appendix, p. 26a), or have a lesser volume of air service, as in this case; (2) that those points should have "the full advantages inherent" in the greater air service available

at major points; and (3) that "only by permitting an integrated air-surface movement under single carrier responsibility will those advantages be afforded present and potential users of air cargo service." Appendix, p. 17a at p. 20a.

Using this rationale the Board has authorized air freight forwarders to render motor service between Detroit and Flint, a distance of 65 or 80 miles, depending on routing; between Cleveland and Akron, a distance of 34 miles; between Cleveland and Canton, a distance of 57 miles; between Cleveland and Youngstown, a distance of 67 miles; between Terre Haute and Indianapolis, a distance of 71 miles; between Kansas City, Missouri and St. Joseph, Missouri, a distance of 47 miles; and between Dallas and points as much as 46 miles distant.[4]

In every case the practical effect of the Board's action is to license air freight forwarders to render line-haul motor common carriage in competition with motor common carriers rendering service pursuant to certificates of public convenience and necessity from, and under regulation by, the Interstate Commerce Commission. Motor operations extending "into the territory adjacent to, and served primarily by, another airport clearly take on the character of interterminal line-haul service *in substitution for, rather*

[4] *Supra*, p. 6, fn. 2; Order E-24231 in Dockets 15581 and 15582 and Order E-24232 in Dockets 15664 and 15665, both issued September 27, 1966, and both before the United States Court of Appeals for the District of Columbia Circuit *sub nom. National Motor Freight Traffic Association, et al.* v. *C.A.B.*, Nos. 20595 and 20596. Mileages are short highway miles as shown in Household Goods Carriers Bureau Mileage Guide No. 8, filed with the Interstate Commerce Commission September 20, 1966 as Tariff MF-ICC No. 139.

*than incidental to, air transportation." Peoples Express Co. Extension of Operation—Air Freight,* 48 M.C.C. 393, 396 (1948); quoted with approval and with the emphasis in *Motor Transportation Of Property Incidental To Transportation By Aircraft, supra,* 95 M.C.C. at 75. Moreover, the Board's actions create competition for local service air carriers such as those rendering service between Flint and Detroit, Cleveland and Akron/Canton, Cleveland and Youngstown, Indianapolis and Terre Haute, and Kansas City and St. Joseph, most of which are able to operate only because they are directly subsidized by the United States.[5]

In short, the Board has embarked on a course that will have major ramifications on the nation's transportation system. Its decision to do so is certainly important enough to warrant review by this Court if, as we shall show, there is a legally substantial question of the Board's authority to do so.

## The Question Is Substantial

### The Board's Criteria

Until the Board promulgated Part 222 of its Economic Regulations it had no regulations governing the performance of motor common carriage by air carriers other than those contained in Part 221, 14 C.F.R. § 221 *et seq.,* which merely require air carriers to publish and file with the Board tariffs containing their

[5] Frontier Airlines, Inc. opposed the application for authority to render motor service between Kansas City and St. Joseph on the ground that substantial revenues would be diverted from it. Presumably the diverted revenues will be recouped from an increase in the subsidy to it, which the Board tells us was $5,780,000 in the fiscal year 1966.

rates and charges for such pickup and delivery service as they render. However, as a matter of administrative practice, the Board generally refused to accept for filing tariffs providing for pickup and delivery service at points more than 25 miles from the airport serving a particular city or from the corporate limits of the city itself. Preamble to Part 222 of Board's Economic Regulations, Appendix, p. 6a.[6]

Neither did the Interstate Commerce Commission have any regulations defining the scope of the exemption in Section 203(b)(7a) of the Interstate Commerce Act of motor carriage "incidental to transportation by aircraft." However, as a matter of administrative practice, it treated as within the exemption motor carriage in the pickup and delivery of air freight rendered by or for air carriers pursuant to their tariffs filed with the Board. *Hazel Kenny Extension —Air Freight,* 61 M.C.C. 587 (1953). As the Commission there stated, its practice was "based on the assumption that [the Board] would not hesitate to reject any [tariff] publication which would result in an unreasonable enlargement of [an air carrier's terminal] area." 61 M.C.C. at 596. Conversely, the Commission treated as subject to its regulation the motor carriage of air freight to points beyond the air carriers' terminal areas, and accordingly issued numerous certificates of public convenience and necessity restricted, as is that of Petitioner United, to the motor common carriage of property having an immediately prior or an immediately subsequent movement by air.

[6] At the major points of New York, Chicago and Los Angeles the Board accepted for filing tariffs providing for pickup and delivery service at points somewhat more than 25 miles from their city limits.

On August 21, 1961 the Board instituted a rule making proceeding on proposed rules which contemplated its acceptance of pickup and delivery tariffs of air carriers providing for service within 50 miles of any point receiving air service, and within any other zone that might be specifically established by the Board at major points. Preamble to Part 222 of the Board's Economic Regulations, Appendix, pp. 6a-6b. Petitioner NMFTA and others thereupon petitioned the Interstate Commerce Commission to institute a rule making proceeding to determine the areas within which the motor carriage of air freight could be considered incidental to transportation by aircraft and hence exempt from economic regulation by the Commission, and simultaneously asked the Board to hold its proceeding in abeyance pending action by the Commission. On October 4, 1961 the Commission instituted the proceeding NMFTA had asked it to institute.

The two proceedings culminated in the spring of 1964 when the Commission and the Board simultaneously published in the Federal Register what the Board has styled "complementary" regulations (Appendix, pp. 3a-12a) designed, as it stated in the Preamble to its Regulations, to avoid "undue conflict between what the Board considers 'service in connection with . . . air transportation' and what the Commission considers service 'incidental to transportation by aircraft.'" Appendix, p. 6a at p. 7a. To achieve what the Board called "a practical accommodation" between the two agencies, it and the Interstate Commerce Commission promulgated a single basic standard for determining whether motor transportation is a service "incidental to transportation by aircraft" within the meaning of Section 203(b)(7a) of the Interstate Com-

merce Act and therefore a "service in connection with . . . air transportation" within the meaning of Section 403(a) of the Aviation Act.

Thus, the Commission's Regulations define the transportation of property which is "incidental to transportation by aircraft" as that which ". . . is confined to the transportation of shipments in bona fide collection, delivery, or transfer service performed within the terminal area of the direct air carrier or air freight forwarder (indirect air carrier) providing the line-haul transportation . . . ." 49 C.F.R. 210.40(a), Appendix, p. 3a. The Board adopted the same standard for determining whether motor carriage is service "in connection with" air transportation. Thus, it said in the Preamble to its Regulations that whether the movement of air freight by truck constitutes "service in connection with air transportation" depends on whether it is "truly air cargo pickup and delivery . . . as distinguished from line-haul or over-the-road surface transport." Appendix, p. 9a. And in the very order Petitioners here challenge, the Board said (Appendix, p. 20a):

> "Part 222 is designed to provide a fair and workable procedure for considering, on a case-by-case basis, requests by direct air carriers or air freight forwarders for extension of pick-up and delivery services to points beyond the area covered by existing tariffs, or the established 25-mile rule-of-thumb terminal area. The ultimate question to be resolved in each individual case under such procedure is whether the service proposed by the air carrier is truly pick-up and delivery in nature, or whether it is, in fact, a line-haul operation."

The Commission's decision promulgating its regulations, *Motor Transportation of Property Incidental to*

*Transportation by Aircraft,* 95 M.C.C. 71 (1964), was judicially reviewed and affirmed *sub nomine Air Dispatch, et al.* v. *United States,* 237 F. Supp. 450 (E.D. Pa. 1964), affirmed per curiam 381 U.S. 412 (1964). The gravamen of the judicial attack, mounted by the air freight forwarders, was that the Board had exclusive jurisdiction to determine "when motor carrier transportation is a part of air transportation" and therefore exempt from regulation by the Commission. 237 F. Supp. at 451. The District Court's opinion makes clear that the respective jurisdictions of the Board and the Commission are mutually exclusive. In other words, the motor transportation of air freight is regulated either by the Board or by the Commission, but not by both.[7] In an *amicus* memorandum, filed at the request of the Court, the Board agreed that the determination of the scope of motor carriage exempt from regulation by the Commission and therefore under regulation by the Board was to be made by the Commission, and that "the regulations of the two agencies were adopted in an effort to reach a practical accommodation with respect to the problems involved." Motion to Affirm in No. 1004, Oct. Term 1964, p. 4.

The practical accommodation effected was this: The Board, as we've seen, undertook to confine motor carriage by air carriers to true pickup and delivery service within reasonable terminal areas. The Commission exempted from its regulation motor carriage authorized by the Board as true pickup and delivery service within terminal areas described in tariffs accepted by

[7] A partial exception not pertinent here is air-motor service at joint through rates authorized by Section 1003 of the Federal Aviation Act, 49 U.S.C. 1483, which rates must be filed with both the Board and the Commission and are regulated by a joint CAB-ICC Board.

the Board. 49 C.F.R. § 210.40(a), Appendix, p. 3a. In other words the Commission delegated to the air carriers and the Board the authority to fix air terminal areas within which motor carriage would be exempt from regulation by the Commission. However, noting that the geographical limit of the exemption at any given point would expand automatically were the Board to "allow carriers to extend the area in which they offer terminal services", the Commission provided (49 C.F.R. § 210.40(c), Appendix, p. 4a) for the institution of proceedings "looking toward the definition of the geographical extent" of the exemption at any particular point, in which proceeding the prior action of the Board "allowing air carriers to publish extended terminal service tariffs would be considered but would not be determinative." 95 M.C.C. at 87.

Obviously, this scheme of complementary regulations requires that both the Board and the Commission employ the same basic criteria for determining whether particular motor transportation is truly pickup and delivery as distinguished from line-haul service. The Board "anticipates . . . that the ICC will give due and appropriate weight to the Board's findings that the contemplated services are truly air cargo pickup and delivery in nature." Preamble to Part 222 of the Board's Economic Regulations, Appendix, p. 6a at p. 10a. As the First Circuit put it in *Law* (Pet. for Cert. in No. 989, Appendix, p. 23a):

> "The Board has promulgated its philosophy and its procedures in concert with the Interstate Commerce Commission. The system, devised to avoid interagency conflict while preserving agency sovereignty, is to give the Board the first judgment, which shall be given non-conclusive respect by I.C.C."

It is perfectly plain that there can be neither a practical accommodation nor the avoidance of interagency conflict unless motor carriage incidental to transportation by aircraft is the same thing as motor carriage in connection with air transportation. The Commission can't give "due and appropriate weight" to the Board's findings unless they are addressed to the criteria the Commission employs. The two agencies can't play the same game under different rules. As the General Counsel of the Commission said in a letter commenting, at the request of the Department of Justice, on the Board's order in this case:

> ". . . basic to both Sections 403 and 203(b)(7a) is a determination of whether Emery is performing a bona fide pickup and delivery service. If it is performing such a service, then its motor carrier operation will be both, 'in connection with' air transportation (under Section 403(a) of the Aviation Act) and 'incidental' to transportation by aircraft (under Section 203(b)(7a) of the Interstate Commerce Act.)" (Letter dated March 28, 1966 from Robert W. Ginnane to Howard E. Shapiro, Assistant Chief of the Appellate Section of the Anti-Trust Division, Appendix B to the Board's Brief to the Court of Appeals).

Nevertheless, the Board takes the position that the Federal Aviation Act and its regulations permit it to differentiate between line-haul service and pickup and delivery service without regard to the criteria established by the Commission in its part of the "complementary" regulations, and long established for determining whether motor carriage by or for railroads, water carriers and surface freight forwarders is "incidental" to their service within the meaning of Section 202(c) of the Interstate Commerce Act, 49 U.S.C. 302(c), and therefore exempt from economic regulation as motor carriage. Those criteria have been judi-

cially approved, most recently in 1963 in *Sea-Land Services, Inc.* v. *United States,* 222 F. Supp. 558 (D. Del.). The theory is, in the words of the First Circuit in *Law* (Pet. for Cert. in No. 989, Appendix, p. 24a), that each agency has power "to determine, for its purposes, what is 'in connection with' or 'incidental to' air transportation." As the Board put it, "no purpose would be served by speculating" whether the Commission would determine that the motor carriage it authorized here is exempt from its regulation because the Board's action "is not intended to reflect any views on whether applicant or its motor carrier agent requires additional authority from the ICC or other regulatory agencies." Appendix, p. 21a.

This theory—that the motor transportation of air freight may be licensed and economically regulated by both agencies—makes nonsense of the "complementary" regulations and obliterates the Congressionally established division of authority between the Board and the Commission. As we have seen, the Congress has given the Commission plenary economic regulatory authority over motor transportation that is not incidental to transportation by aircraft and has given the Board plenary economic regulatory authority over motor transportation that is a service in connection with air transportation. It certainly did not intend that both the Commission and the Board exercise their respective authorities over the same transportation, i.e., that both determine whether or not a particular person should be authorized to render a particular service, and, if so, on what terms and conditions and at what rates. This would inevitably create interagency conflicts. Moreover, the conflicts would stem from differences in regulatory standards and policies which each

agency has broad discretion to formulate and apply. Hence they could not be judicially resolved without casting the courts in the role they cannot play, namely that of a super administrative agency.

The three cases relied upon by *Law* are wholly inapposite. *Air Dispatch, supra,* and *Wycoff Co., Inc.* v. *United States,* 240 F. Supp. 304 (D. Utah 1965), held no more than that the Commission had power to determine the reach of the exemption of transportation incidental to transportation by aircraft. *In City of Philadelphia* v. *C.A.B.,* 289 F. 2d 770 (D.C. Cir. 1961), the Board merely held that a direct air carrier would be complying with its obligation under its certificate to render adequate air transportation at Philadelphia, notwithstanding that it chose to serve it through the Newark airport and to substitute motor service between the Philadelphia airport and the Newark airport for air service at the Philadelphia airport. The Board no more authorized or required the air carrier to perform motor carriage between Newark and Philadelphia as true pickup and delivery to be regulated by it under the Federal Aviation Act as a service "in connection with" air transportation than the Commission authorized or required motor carriers to perform rail carriage when it authorized them to substitute rail service for over-the-road service for part of their line-hauls. See *Atchison, T. & S. F. Rwy. et al.* v. *U. S.,* 244 F. Supp. 955 (N.D. Ill. 1965), Nos. 57 and 59, Oct. Term 1966, *sub nom. American Trucking Assns.* v. *Atchison, T. & S. F. Rwy. et al.* In both cases the substituted service is in law what it is in fact—in the first case motor service to be regulated under Part II of the Interstate Commerce Act, in the second case rail service to be regulated under Part I of that Act.

Assuming *arguendo* that Part 222 of the Board's Regulations do not contemplate that it employ the same criteria the Commission employs, they do contemplate the delineation of an area or zone around an airport city within which motor transportation will be truly pickup and delivery. The Preamble to Part 222 speaks throughout in terms of pickup and delivery areas. And Section 222.3(a) provides for the filing of applications "entitled 'Application for Tariff-filing Authority: Pickup and Delivery Zone.'" Hence, the Board was required to find here as *Law* held, albeit erroneously, that it did find there, "a sufficient nexus between" the airport city and the outlying points proposed to be served. Equally obviously, such a finding can only be made on the basis of facts respecting the economic and commercial relationship of the airport city and the outlying points. No such facts were adduced in this case.

As we've seen, a principal basis of the Board's order was Flint's allegedly inadequate air service. But the adequacy *vel non* of air cargo service at a particular point, while of overriding importance in determining whether carriers should be required to improve service or whether additional carriers should be authorized to render service, is irrelevant on the issue whether the motor transportation of air cargo to and from that point is truly pickup and delivery as distinguished from line haul carriage. The soundness of this is self-evident. Were absence or inadequacy of air service a basis for finding a proposed motor service to be pickup and delivery, the distinction between pickup and delivery and line haul transportation would be obliterated, and the Board could authorize, as a service "in connection with" air transportation, motor

carriage to any point to which an air carrier desired to render it.[8]

The Board also treated as a principal criterion in passing upon Emery's application, not the geographic and economic relationship of Detroit and Flint, but the manner in which Emery said it intended to render service. Indeed, only after Emery, in answer to the Board's request (R. 61), stated that it would use straight vans with a capacity of 5,000 pounds and that its charge would be $1.75 per hundredweight, was the Board willing to act on the application. These two representations, coupled with the finding that Emery's operations would be coordinated with the schedules of the air carriers, are the basis of the Board's order.[9] These representations are irrelevant. The size of the equipment a carrier uses depends on the volume of traffic and size of individual shipments tendered to it for transportation. The charges it makes depend on its costs of operation and the value of its service to its customers. As for coordination of operations, every carrier must coordinate its operations with its customers' needs. Thus, it was pointed out in the affidavit in this case that since

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[8] Could it be tenably argued that because Dallas, Texas is not a deep water port the motor carriage of water-borne freight between Dallas and the Port of Houston is pickup and delivery to be regulated as a service in connection with or incidental to water carriage?

[9] This finding is without any support in the record. Emery's initial application alleged that: "Emery desires to add Flint to the Detroit pickup and delivery area to coordinate and control the Detroit-Flint surface movement." (R. 1). Respondent's request for additional information asked the following question, among others: "How will the schedule be coordinated with airline schedules?" (R. 61). Emery did not answer the question in its response to that request. (R. 13).

the "operating authority of [Petitioner United] is limited to the handling of air freight" it must and does "gear its operations to the specific needs of shippers and receivers of air freight."[10] (R. 35).

To treat as a governing criterion the manner in which Emery intends to render its particular service is wholly incompatible with Part 222 of the Board's Regulations. To begin with, the Board did not condition the grant of the application on Emery's even commencing, much less continuing, operations in the manner it proposed. But more fundamental is the fact that, under Section 222.2 of Part 222 (Appendix, p. 10a), the grant of Emery's application constitutes a finding that Flint is within the terminal area of Detroit for all air carriers serving Detroit, in other words, that all transportation of air freight by air carriers between Detroit and Flint is "truly pickup and delivery." Hence, if the Board's order is valid, any of them will be free to perform motor transportation whether or not they perform it in the manner Emery proposed. We submit that this makes it crystal clear that the Board has not employed rational criteria that are appropriate to the purpose and within the contemplation of the Federal Aviation Act and Part 222 of its Economic Regulations.

**The Necessity for a Hearing**

Coming to the second question presented, the necessity for a hearing, we start with the self-evident proposition that the Board has licensed Emery Air Freight Corporation to perform the motor transportation at issue. Under Section 403(a) of the Federal Aviation Act an air carrier regulated by the Board

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[10] Emery is among the shippers and receivers of air freight using Petitioner United's service between Detroit and Flint. (R. 34).

may render only such service to the public as is provided for in tariffs filed with it in compliance with its regulations. Under Section 222.3(a) of those regulations Emery is required to file an application for authority to file a tariff providing for the performance of the motor transportation at issue. Under Section 222.3 (d) of those regulations Emery is forbidden to file such a tariff "unless and until the Board by order approves the application finding that the proposed tariff involves service in connection with air transportation." Emery filed such an application and the Board granted it, thus enabling Emery to perform motor transportation that it could not otherwise lawfully perform. This action is plainly the issuance of a license.

The First Circuit recognized in *Law* that the Board's order "arguably meets the definition of 'license' in 5 U.S.C. § 1001(e): '. ... any agency permit, . . . approval, . . . or other form of permission'," and that "the same act may have characteristics of both rule making and licensing." However, it chose to "affix the 'rule-making' label" to the order "for the purpose of determining the applicable procedural requirements". In so doing it pointed to *American Airlines, Inc.* v. *C.A.B., supra,* affirming an order, entered without an evidentiary hearing, prohibiting combination air carriers from establishing so-called blocked space service.

Reliance on *American Airlines* is misplaced. It held that what the Board had done there was formulate a general rule on the basis of "broad policy considerations" rather than review individual conduct. 359 F. 2d at 629. In other words, the Board did there what it did when it promulgated Part 222 of its Economic Regulations, under Section 222.3 of which

Emery's application was filed, namely, issue an "agency statement of general . . . applicability and future effect designed to implement . . . or prescribe law or policy." 359 F. 2d at 630. In contrast, what it did here was review Emery's proposed individual conduct to determine whether or not it was permissible under the general rules previously promulgated as Part 222. Hence, what we have here is precisely what the Court held was not present in *American Airlines,* namely, action that "in substance and effect is individual in impact."[11] 359 F. 2d at 631.

Moreover, in this case, in contrast to *American Airlines,* the Board was called upon to resolve issues of "adjudicatory" as distinguished from "legislative" fact. This is clear from the Board's own pronouncements. The Preamble to Part 222 of its Economic Regulations states that it will consider applications such as that if granted here "in the light of whether the proposed service is truly air cargo and pickup and delivery . . . as distinguished from line-haul or over-the-road surface transport." Section 222.3(a) of Part 222 requires applications to state the reasons why service—"to [the] location(s) [to which service is proposed] is deemed appropriate and set forth economic data and other facts relied upon." Section

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[11] As *Law* pointed out, under Section 222.2 of the Board's Regulations the effect of granting Emery's application is to authorize all other air carriers serving Detroit to perform motor transportation to and from Flint upon the filing of tariffs providing therefor. However, none has filed such a tariff. Furthermore, this does not make the Board's action any the less individual since a principal ground therefor was Emery's representations that the way in which it itself proposed to render service and the rates it itself proposed to charge made its own particular service pickup and delivery as distinguished from line-haul transport.

222.3 (d) provides that applications will be approved only if the Board makes a "finding that the proposed tariff involves service in connection with air transportation."

The Board held that there were no contested issues of fact, and hence that no purpose would be served by a hearing. As Judge Fahy pointed out in his dissent, this is not so. Emery's amendment to its application stated that it proposed "a special service for Flint" and "intended to utilize straight vans limiting the size of trucks to those with a capacity of 5,000 pounds." (R. 13). Petitioner United is now performing the motor transportation of air freight between Flint and the Detroit airports under a certificate of public convenience and necessity from the Interstate Commerce Commission limited to the transportation of property having an immediately prior or immediately subsequent movement by air carrier. (R. 32). Petitioners' pleading in response to Emery's application was supported by an affidavit of Mr. John Onderko, United's Treasurer, in which he took his oath that, in Judge Fahy's words (Appendix, p. 15a), Emery proposed "a service which in fact could be furnished only by a line haul operation."

Petitioners thereby specifically joined issue on one of the facts that the Board treated as controlling, namely, whether Emery could in fact render service between Flint and the Detroit airports as true pickup and delivery in straight vans with a capacity of 5,000 pounds in contrast to line-haul or over-the-road surface transport. Thus the Court below was not, as it was in *American Airlines,* "confronted solely with a broad conceptual demand for an adjudicatory-type proceeding." 359 F. 2d at 633).

The Court in *Law* makes the startling comment that to hold that a hearing is not required is consistent with the practice of the Interstate Commerce Commission in fixing commercial zones and terminal areas for surface carriers. The fact is that the Commission fixes such areas only on the basis of full findings of fact developed in proceedings designed to assure that all relevant evidence is adduced. Compare the findings of the Commission in *St. Louis, Mo.-East St. Louis, Ill., Commercial Zone,* 61 M.C.C. 489 (1953), upon which *Law* relies, with those of the Board here. Moreover, in *St. Louis* the Commission noted that when its "experience in motor carrier regulation was either negligible or considerably more limited" it held "formal hearings." 61 M.C.C. at 492. The Board here, by its own admission, is dealing with "pilot cases [that] present new policy questions with no precedent for guidelines." *Supra,* p. 8. Even now, after years of experience, the Commission holds adjudicatory hearings when they are necessary to assure an adequate record. See for example *New York, N.Y. Commercial Zone,* 88 M.C.C. 336 (1961); *Commercial Zones and Terminal Areas,* 54 M.C.C. 21 (1952). Furthermore, in cases in which the issue is whether a particular operation by a particular carrier is in fact pickup and delivery as distinguished from line-haul service adjudicatory hearings are invariably held. See for example, *Central Truck Lines, Inc.* v. *Pan-Atlantic S.S. Corp.,* 82 M.C.C. 395 (1960); affd. *sub nom. Sea-Land Service, Inc.* v. *U. S.,* 222 F. Supp. 558 (D. Del. 1963).

In any event, whether the Board's action was legislative or judicial is not determinative of the necessity for a hearing. As Professor Davis states

in his Treatise on Administrative Law, Vol. I, § 7.03, p. 416:

> "The proposition that a hearing is necessary for judicial action is . . . clearly false. Equally false is the converse proposition—that a hearing is never required for legislative or non-judicial action."

Professor Davis points out that there are numerous types of rule making, notably rate making, in which hearings are required notwithstanding the absence of any specific statutory requirements therefor. The reason is that an agency commonly acts judicially, i.e., adjudicates issues of fact, in legislative as well as in judicial proceedings. And it is the presence or absence of adjudicative facts, not the formal nature of the proceeding, which determines whether a hearing is necessary.

**The Absence of Substantial Evidence**

As for the third question presented, the evidence of record is obviously insufficient to permit a determination whether or not the service proposed is truly pick-up and delivery under any established or acceptable criteria for differentiating pickup and delivery from line-haul carriage. But even if what *Law* called the Board's "new formula" for making the determination be valid, there was not sufficient evidence here to permit the application of that formula.

*Law* described the Board's new formula as "a combination of reasonably close communities where service is rendered in smaller trucks, closely tied in with air schedules, and where rates are geared to the smaller shipments." Pet. for Cert. in No. 989, Appendix, p. 24a. Since the Court below wrote no opinion, but

simply cited *Law,* it must have approved that description.

Although the Court in *Law* characterized the record in that case as scant, general, sparse and thin, it concluded that it could not "*quite* say that the Board was clearly erroneous in finding sufficient evidence." Pet. for Cert. in No. 989, Appendix, p. 23a; Emphasis supplied. The record here is more scant, more general, more sparse and more thin. In this case Emery made no representation such as it made in *Law,* namely, that Nashua, New Hampshire "has a strong cultural, commercial and industrial affinity to Boston and the preponderance of its commerce moves via the Boston gateway." The Board here made no finding such as it made in *Law,* namely, that Nashua "has a strong community of interest with Boston." In short, the Board here neither could nor did find, as finding *Law* held necessary under its "new formula", "a sufficient nexus" between the airport city and the point proposed to be served.

Furthermore, in this case, as Judge Fahy pointed out in his dissent, Petitioners showed that "the Interstate Commerce Commission acting under *comparable statutory provisions* had held that service between the Detroit airports and Flint was not 'incidental to transportation by aircraft' . . . ." Appendix, p. 16a. Coupled with this showing was Petitioners' sworn factual statement that the service proposed could not be rendered in the manner Emery alleged. In the face of this joinder of an issue of fact, the Board could not, as it did, base a finding on Emery's unsworn allegations.

An adequate record is especially necessary when, as in *Law* and here, the Board is dealing with "pilot cases

[that] present new policy questions with no precedent for guidelines." In such cases the courts are charged with determining, not simply whether the Board properly applied settled policies and standards in a particular case, but whether it has formulated policies and standards that are rational, appropriate to the discharge of its regulatory duties, and within the scope of the power the Congress delegated to it. In such cases something more than a scant, general, sparse and thin record is imperative. See *Eastern Central Motor Carriers Association* v. *United States,* 321 U.S. 194, 209-210 (1944), in which this Court, reversing an order of the Interstate Commerce Commission, held that what might be an adequate record in an ordinary case is not adequate in a case presenting, as do the cases here, "novel" and "complex" questions of policy that "may touch vitally the public interest."

One searches the record here in vain for any of the economic data and facts that *Law* held relevant. As for the Board's order, it reflects the same "lack of developed thought" that Judge Aldrich found shocking in *Northeast Airlines, Inc.* v. *C.A.B.,* 331 F. 2d 579, 589 (1st Cir. 1964). Indeed, on the basis of the record here the Board's policies and standards appear to be that whatever motor transportation air carriers wish to perform is pickup and delivery service in connection with air transportation.

## CONCLUSION

It is of course true that the Interstate Commerce Commission has reserved the right to institute a proceeding to define individually the area around any particular city within which motor service by air carriers will be exempt from its regulation as "incidental

to transportation by aircraft." 49 C.F.R. § 210.40, Appendix, p. 4a. But this does not render review of the Board's action by this Court any the less important. The Board and *Law,* as we have seen, *supra,* p. 20, contemplate dual regulation. Even if they be wrong, as *Air Dispatch* indicates,[12] and as assuredly they must be if interagency conflict is to be avoided, the practical effect of the application of the Board's so-called "new formula" will be to require an individual terminal area proceeding before the Commission in every case in which the Board grants an application under Section 222.3 of its Economic Regulations.

In its Preamble to Part 222 of its Regulations the Board Pointed out that the President's Transportation Message to the Congress of April 5, 1962 requested it and the Commission "to discuss regulatory problems affecting the various modes of transportation and to seek coordinated solutions . . . that will improve the regulatory process." (Appendix, p. 6a at p. 7a). The "complementary" regulations of the Board and the Commission were the first fruit of compliance with that request. The Board's actions under its part of the "complementary" regulations clearly makes them an exercise in futility. We submit that the interpretation of the Federal Aviation Act and Part 222 that violates their terms, aborts their purpose and produces results which are the antithesis of "coordinated solutions . . . that will improve the regulatory process" requires review by this Court.

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[12] See 237 F. Supp. at 452, where the Court said that the "determination by the C.A.B. as to a reasonable terminal area may be completely overruled by the I.C.C."

Wherefore, Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review its judgment in this cause.

Respectfully,

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